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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE CIVIL JURISDICTION

FIRST APPEAL NO.560 of 1993
WITH
CIVIL APPLICATION NO. 3823 of 1993

Narayan Gopal Upadhye
Residing at 1655, New Pachha Peth,
Solapur 413002. ..Appellant

v/s.

Arvind Gopal Kumbhakoni and others
Residing at 157, Railway Lines,
Solapur 413001. ..Respondents

WITH
WRIT PETITION NO. 5901 OF 2005

Shri Arvind Gopal Kumbhakoni ..Petitoner

v/s.

Shri Narayan Gopal Upadhye & ors. ..Respondents

Shri Narayan G. Upadhye, Appellant in person

Shri Y.S.Jahagirdar, senior counsel i/b. A.M.Kulkarni,
Advocate for respondent no.1

Mrs. G.P.Mulekar, AGP for respondent no.3 - State.

CORAM : ANOOP V. MOHTA,J.
DATED : 31st October, 2007

JUDGEMENT

. Both these matters are heard by consent and disposed of by this common order.

2. The present appeal is under section 72 of the Bombay Public Trust Act (BPT Act) filed by the appellant claiming to be a person interested in the alleged trust namely SARVAJANIK KALJAPUR SHRI MARUTI DEVALAYA, at Solapur.

3. In so far as writ petition no. 5901 of 2005, the petitioner is the respondent in the first appeal. The appellant in the first appeal is respondent no. 1 in the writ petition.

4. The facts in the writ petition as interlinked and connected and as relevant for both the matters are as under:

5. The alleged dispute between the parties pertains to the suit property bearing C.T.S. No. 8387 situated at the heart of the City of Solapur, wherein one Maruti Devalaya (for short 'the temple') is situated.

6. The temple is a family temple and is fully owned by the petitioners and his family from his forefathers.

7. The 1st Respondent has no concern whatsoever with the suit property and as such has no locus standi in conducting and/or prosecuting any litigation in that regard.

8. The 1st respondent has, however, simultaneously

claimed himself to be an Advocate, a Bhikshuk, a Trustee, a devotee etc. in different proceedings before the different courts/authorities to suit his purpose of being able to prosecute the concerned litigation.

9. Originally the number of the suit property was Survey No. 709. Accordingly revenue record has been maintained.

10. In the year 1915 the City Survey was conducted and was applied to entire City of Solapur, the suit property was re-numbered as C.T.S. No. 8387.

11. On 29-7-1932 after due enquiry, one Sanad was issued in the name of Petitioner's father. This document of Sanad is a document of confirming the title to the property of the Petitioner's family in perpetuity.

12. In the year 1984 the 1st Respondent fraudulently, after preparing a 7 X 12 extract of the suit property started claiming the suit property to be a property of an alleged trust of which he claimed to be a trustee alongwith the Collector of Solapur.

13. On 7-7-1984 the petitioner applied to the

Tahasildar, North Solapur, to cancel the V.F. 7x12 in respect of Survey No. 709 in view of the City Survey record.

14. On 26-7-1984 after due enquiry, the Tahasildar was pleased to order closure of the V.F. 7X12.

15. On 10-8-1984 for the implementation of the said order the aforesaid Mutation Entry No 10999 was effected in the revenue record.

16. The 1st respondent raised an objection in respect of the certification of the said entry. The matter was, therefore, transferred to Dispute Register for enquiry bearing No. 17/84.

17. On 12-12-1984 again after due enquiry, the Tahasildar was pleased to order the certification of the said entry.

18. On 2-4-1989 the R.T.S. Appeal No. 94 of 1985 preferred by the 1st Respondent against the said decision before the Sub Divisional Officer, Solapur was also dismissed.

19. On 31-5-1993 the R.T.S. (Second) Appeal No. 59 of

1989 preferred by the 1st Respondent against the said decision before the Additional Collector of Solapur Was also dismissed.

20. On 6-7-1993 the 1st respondent then filed a proceedings as R.T.S. Appeal, before the Additional Commissioner, Pune.

21. On 9-3-2005 the Additional Commissioner, Pune, however, was pleased to allow the Revision and set aside the Judgement and order passed by the Additional Collector. The Additional Commissioner was also pleased to cancel the Mutation Entry No. 10999.

22. The above facts as reflected are relevant for the purpose of adjudicating the first appeal also. The prayers in the writ petition are as under:

> (b) This Hon'ble Court be pleased to quash and set aside the impugned Judgement and order dated 9-3-2005 passed by the learned Additional Commissioner, Pune Division, Pune, in Revision No. RTS/SHP/188/1993 (Exhibit 'H') entirely with costs
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> (c) This Hon'ble Court be pleased to confirm the order dated 26-7-1984 passed by the Tahasildar as

also certification of Mutation Entry No. 10999 (Exhibit A) entirely with costs.

(d) Pending the hearing and final disposal of the present petition, the effect, operation, implementation and/or execution of the impugned Judgment and order dated 9-3-2005 passed by the learned Additional Commissioner, Pune Division, Pune, in Revision No. RTS/SHP/188/1993 (Exhibit H) as well as all further proceedings of the Mutation Entry No. 3888 may be stayed;

(e) Interim/Ad-interim relief in terms of prayer clause (d) above be granted.

23. This Court on 21-11-2005 has admitted the writ petition and granted the ad-interim relief in terms of prayer clause (d) which has been in force till this date.

24. At the instance of the appellant in first appeal, the present writ petition tagged alongwith this appeal for hearing by an order of Hon'ble the Chief Justice.

25. As noted by an application no.183/1984 the applicant

invoked the jurisdiction of Dy. Charity Commissioner, Pune (Exh.1) under section 18 of BPT Act. The enquiry was contested by the respondents. After considering rival contentions as well as material available on record based upon the preliminary point whether there is any evidence or prima-facie case made out by the applicant to proceed with the matter as contemplated under section 18 of the BPT Act as claimed by the applicant.

26. The writ petition no. 5462/1986 was filed whereby, the Court has directed to dispose of the enquiry by January 1987 and further directed to submit the report accordingly. The appellant, therefore, moved other applications exh. 71 and 72. The matter was adjourned accordingly. Lastly, the evidence of the applicant was recorded and completed on 9-3-1987. As recorded full opportunities were given to both the parties.

27. By an order dated 26-6-87 on a preliminary enquiry and after considering the material placed on record including the evidence led by the parties, the learned authority has observed that "there is no evidence or no prima-facie case as made out by the applicant to proceed with the matter and held an enquiry further as contemplated under the provisions of BPT Act and hence proceedings will have to be withdrawn and further

enquiry be stopped". This was confirmed in appeal no.22/1987 by Charity Commissioner, Pune on 1-2-1988.

28. In the meantime the appellant's letter was converted into suo-moto writ petition. The important order of Hon'ble High Court passed on 16-2-1987 in suo-moto writ petition no. 5462/1986 is reproduced as under:

> "Rejected.
>
> We find that the petitioner is conversant of filing Court proceedings and this is not a fit matter to entertain the Petition on a letter. We also find from affidavits that petitioner is not fighting a public litigation but a private litigation. Entertaining such petition on basis of letter would be misuse of Writ jurisdiction".

29. The appellant, alongwith one Mr. Gopal preferred an application under section 72 of the BPT Act and challenged the above orders in misc. civil application no. 67/1988. The IVth Additional District Judge, Solapur after taking into consideration the rival contentions as raised, dismissed the said application by order dated 5-10-99 that resulted into confirmation of the order dated 26-6-1987 passed in original misc. application in question as the same was also confirmed by the learned Joint Charity Commissioner in appeal no. 22/1987 on 1-4-1988 with the direction to proceed with

against the applicant under section 79 (cc) of the BPT Act and/or to invoke the penal laws as recommended by the Dy. Charity Commissioner.

30. By the impugned order dated 5-10-1991, the applications filed by the applicants along with other 2 were also dismissed as recorded above. Therefore, present appeal. After remand the order is dated 29-3-2004 and lastly dated 14-3-2006 passed by the District Judge, Solapur. The respondent has preferred cross objection on certain findings on 10-7-2006 within limitation.

31. The appellant who appeared in person made his submissions and also filed a synopsis of arguments in the first appeal with reference to the writ petition no. 5901 of 2005 also. The learned senior counsel appearing on behalf of the respondents, apart from his oral submissions have also filed on record the written submissions. Both the parties have exchanged their written submissions and proceeded accordingly.

32. First of all we have to consider the scheme and purpose of section 70 and 72 of the BPT Act. The requirement that the Court can consider such application/appeal only if there are any substantial

questions of law as contemplated under section 100 of the Civil Procedure Code if raised. Such first appeal as per the scheme is at par and equivalent to provisions of section 100 of Civil Procedure Code. Admittedly, three authorities/Courts below after considering the rival contentions, rejected all contentions as raised by the appellant from every angle. The finding of fact so arrived at just cannot be overlooked. After hearing both the parties the appellant is unable to demonstrate any perversity in the order. The requirement under the law is that the concerned authorities based on the material available to pass appropriate order. The reasoning as recorded above in noway appears to be contrary to the material available on the record.

33. The important facet, therefore, apart from the above basic submission as rightly submitted by the Senior counsel appearing for the respondents in reference to the jurisdiction of this Court to interefere in the concurrent findings as arrived at by the authorities. It is submitted even on merits there is nothing as recorded by the authorities.

34. The learned senior counsel appearing for the respondents have strongly relied on case of **S.S.Pardeshi v/s. Leelabai B.Kalwar reported in 1998 II Bombay cases**

744. Apart from the facts and circumstances of the case it is also sufficient to dismiss the first appeal on this ground, as there are no questions of law or any perversity in the matter.

35. On the contrary after considering the evidence as led and after verifying the documents against the appellant, the concerned authority has directed to initiate action under section 79(cc) of the BPT Act and also observed penal action under the I.P.C. The findings so arrived at by the concerned authorities are confirmed throughout and as it is within the framework of law and record, need no interference at the instance of the appellant.

36. There is no trust deed or any documents and/or any kind of evidence to support the case of the appellant/claimant about the creation and/or existance of such trust at any point of time or at the time of the application filed by the appellant for registeration. The Dy. Charity Commissioner, therefore, being a basic authority under the BPT Act framed specific preliminary issue and which was answered accordingly as recorded above.

37. Once there is no material for registeration of the

alleged trust, the power of such trust under the BPT Act is also very limited. The dispute whether the property is a private property or the Government property and/or the public property is not within the scope and power of the authorities under the BPT Act. The remedy is elsewhere.

38. The facet that the appellant and/or a party to move such application, if failed to support the same and as observed by all the authorities, thereafter cannot be permitted to raise such issues again by putting new factor and/or new documents on record now. On the contrary as record shows the concerned authorities come to a conclusion that the said document is a fabricated and forged document.

39. With the assistance of learned senior counsel appearing for the respondent and the appellant himself, the Court at the time of hearing of the matter again peruses the said documents alongwith the other material. The said document in no way can be treated as a document and/or trust deed as sought to be contended by the appellant. Therefore, even otherwise after considering the finding as arrived at, I am also of the view that based upon the said document, the appellant has no case to establish any right or title or interest in the said

property. The submission that the suit property is a Government property also remained unsupported by any documents and/or material. Mere allegations are not sufficient. The appellant having made application on a foundation that the property is a trust property just cannot be allowed to say that the suit property is a Government property also. The stand and/or submission in such matter should be clear. Having once raised the specific case that the property is the trust property and the trust is created by the particular document, the submission that the suit property is the Government property itself collapse. It also destroys the case of appellant that the property in question is trust property as sought to be contended. The further contention that the disputed property is a public property and not a private property is also not correct. Inconsistant stand and contradicotry submissions as raised is also a basic factor which goes against the appellant.

40. In contradiction to this, there is material on record to justify the case of the respondents.

(a) that the suit property has always been treated by the respondents and his family members as a personal property.

(b) the said fact was well within the knowledge of the persons of locality and others concerned.

(c) the State Government has also treated the property as a property belongs to the family of the respondents.

(d) The Sanad issued sometimes in the year 1993 by the Government, by declaring a part of the property as excess in urban lands also support the same. There is no contra material to deny the claim and the rights of the respondents on the property in question.

41. After registered partition the family of the respondent has also got the suit properties divided into various plots that has been sold out to third parties who have constructed their respective bunglows. The construction of multi storey apartment and flats after due public development is also just cannot be lost sight of.

42. All these facts and activities were well within the knowledge of the people at large including the appellant.

43. There is nothing and/or no material whatsoever made out by the appellant justifying in filing of an application for taking documents on the record at this stage of the proceedings. The fact of existance of temple and the regular control and authorities of the said property of the respondents is not in dispute. There is nothing further to show what was the occassion for the applicant to file such application even by using the such forged and fabricated documents. Apart from that, no authorities as contemplated under the law, at any point of time, took any initiation or action treating the property as trust property. It is only at the instance of the appellants, the provisions of the BPT Act were invoked and as directed by the High Court, the enquiry was held which has also confirmed that there was no such public trust intended or even created at any point of time.

44. In so far as the impugned order of learned Additional Commissioner in revision application dated 9-3-2005 in above background and even otherwise, the learned senior counsel appearing for the petitioner in writ petition/respondent in first appeal is right in submitting that the Additional Commissioner has exceeded his jurisdiction in exercising its power under section 257 of the Maharashtra Land Revenue Court, 1966 (MLRC).

The said revision was filed against the order dated 31-5-1993 passed by the additional Collector, Solapur in appeal no. 59/1989 whereby the mutation entry no. 10999 was entered into and allowed by the additional Collector, the same now has been quashed and set aside by the impugned order. Admittedly, the document of the year 1908 produced by appellant respondent no.1 not made available before the lower authorities in the detail enquiry in respect of the concerned mutation entry, as held by the appropriate authority. After due enquiry conducted by the Tahsildar, the concerned mutation entry was entered into based upon the material available at the relevant time. The said certification was confirmed by all the three authorities consecutive. The interference by the Revisional Court in such orders by considering the new documents for the first time is incorrect.

45. The said document does not create any right, title or interest in favour of respondent no.1 (appellant in appeal) nor it affects the right, title and interest of the petitioner/respondent. Even otherwise such mutation entries noway decide the right and title basically when the said document of the year 1908 is in the nature of report and not the concluded finding of competent Court to decide the title in either way. In any way

respondent no. 1 appellant is not claiming any title, interest in his favour.

46. The said document was produced for the first time before the Hon'ble High Court in first appeal no. 560/99. The Hon'ble High Court based upon that had called findings from the District Court, Solapur. The same was reconsidered a fresh by the District Court by granting reasonable opportunity to respondent no. 1. The District Judge, thereafter observed that the said document does not create any right and title in favour of respondent no. 1 as he failed to prove that the suit property is a public property. The fresh finding was,therefore, again directed by order dated 29-6-2005, therefore, on the date of impugned order i.e. 9-3-2005 the said document was under scrutiny and enquiry before the competent court. Therefore, the reliance based upon the said document to reverse the concurrent finding of all the three Courts is bad in law.

47. Taking all this into account, the impugned order dated 9-3-2005 passed by learned Additional Commissioner, Pune is quashed and set aside. In the present writ petition while admitting the petition on 21-11-2005, this Court has granted ad-interim relief in terms of prayer clause (b). The same has been in

existance since then. In the result the order dated 26-7-1984 passed by the Tahsildar and certificate of mutation entry no. 10999 is confirmed.

48. As noted the District Judge, Solapur by order dated 14-3-2006 on order passed in first appeal framed the points for determination as under:

(i) whether the applicants prove that such type of public trust was and is in existance.

(ii) whether applicant proves that said Sarvajanik Kaljapur Devasthan is a public property.

49. The High Court, thereafter, quashed the order dated 29-3-2004 and further directed to held adenovo enquiry. The Court,therefore, further framed following issues:-

i) whether Sarvajanik Kaljapur Shri Maruti Devalay, Solapur trust was or is in existance?

ii) if yes, whether it is public trust or private trust?

iii) whether property bearing land survey no. 709, present CTS 8389 belongs to or owned by above said trust.

The findings given are;

i) yes, was in existance.

ii) public trust.

iii) yes, it was owned by the said trust.

50. By order dated 14-3-2006 those issues were answered and informed to the Court. The respondent has preferred the cross objection being aggrieved and affected by the above order dated 14-3-2006.

51. After going through the said order and reasoning given and specially para no. 9 to 16, I am of the view that the issues have been answered wrongly. There is a clear finding recorded by the learned trial Court in the judgement that the alleged trust as claimed by the appellant herein is not in existance as there was no reliable evidence produced to support the same. There is a clear finding given in para-13 that there is no such trust Sarvajanik Kalajapur Maruti Devalya created by the appellant, therefore, holding of a trust property by trust does not arise (para 13 and 16).

52. The issues,therefore, as answered is not correct. Apart from this, in such proceedings the Court has no jurisdiction in trying or entertaining or deciding the title of the property and/or question as to whom the property in issue belongs. Such order is without jurisdiction. The finding, therefore, as arrived at in para 17 and 18 are quashed and set aside. The remedy lies somewhere else. The scope and power under section 19 of the BPT Act is very limited. Therefore, also such declaration of ownership of the property inspite of observing that there exists no trust is without jurisdiction. The answer specially in issue no. 3 of deciding the title to such immovable property is also without jurisdiction specially when no such specific issue was made about the ownership of the property. Neither that was the issue before the courts below i.e. Dy. Charity Commissioner and/or the Joint Charity Commissioner.

53. The another important facet is the judgement and order of the Additional Commissioner dated 9-3-2005, has been challenged in the present writ petition. As recorded the said order of additional commissioner has been stayed and said interim order has been in existance till this date. Therefore, any observation and/or finding given based upon the Additional Commissioner is

also an additional factor which goes against the reasoning given by the District Judge. All the issues, therefore, as answered are wrong. Now having heard both these matters together and the order of additional commissioner has been quashed and set aside in the said writ petition. Therefore, also the reasoning and order as arrived at in order dated 14-3-2006 by the District Judge in Ms. civil application no. 67/1988 deserve to be quashed and set aside.

54. Even on merits the Court on relying on documents at exh. 137 produced in the enquiry no. 183/84 dated 27-9-1993 the said document was rightly rejected by all the Courts, as the same being declared forged and fabricated. The Joint Charity Commissioner has infact directed to lodge the criminal prosecution against the appellant. The findings so given and arrived at by the Courts below just could not have been ignored. The reasoning, therefore, as given on the basis of these documents and in view of the order passed by the Additional Commissioner which has been stayed in the writ petition is contrary to the record and perverse. The order as given is based upon the self contradictory findings as to the existance of alleged trust is, therefore, unsustainable.

55. In totality the first appeal no. 560/1993 filed by the appellant Narayan is dismissed. However, the cross objection as filed by the respondents is allowed. The judgement and order passed in Ms. civil application no. 67 of 1988 is quashed and set aside. The order passed by the Additional Commissioner dated 9-3-2005 is quashed and set aside. The Mutation entry dated 12-12-1984 is also restored.

56. Writ Petition No.5901/2005 is allowed in terms prayer clause (a)&(b).

57. In view of above reasoning, the civil application no. 3823/1993 is also disposed of. Another application with same number under order 41 Rule 27 (aa) of the Civil Procedure Code filed by the appellant for taking documents from Pune Archieves which is marked as P-1, while remanding the matter by this Court by order dated 19-11-2003 and same has been considered in all respects even while disposing of the main first appeal and writ petition, therefore, also stand disposed of.

58. Both these matters are accordingly disposed of by common order with no costs.

[ANOOP V. MOHTA,J.]